CURRENT LEGAL PERIODICALS.

CONSTITUTIONAL LAW.

The True Constitution. J. C. C. This article is of interest as a type of many now appearing in our periodical literature, legal and non-legal. It is an attempt to work out the theory of nationality along new lines, which are vaguely perceived, and therefore not clearly stated. In these articles the constitutional theories of James Wilson are cited and his doctrine spoken of—as in this instance— that of "Hamilton and Wilson." No more complete error could be made. No one who has more than superficially examined the theories held by James Wilson could speak of the theories of these two men as making one common doctrine. Mr. Wilson's constitutional theories seem rather to dazzle than enlighten those who take them up chiefly as a means of re-enforcing their own prejudices in favor of certain interpretations of the constitution. Mr. Wilson had a broad, rational, well defined, theory of constitutional interpretation, but one that does not lend support to the extreme exponents of either of the two theories which have for so many years divided the sentiments of the country between them. A strong believer in the rights of the states, Mr. Wilson cannot successfully be exploited by those who would concentrate all power in the nation; an ardent nationalist, he cannot be used to emphasize the theory of state sovereignty. A most devoted believer in the people; in government by the people; in the sovereignty of the people, he can be brought forward with success solely by those who in this day, desire, as in his day desired, to establish and confirm them in that sovereignty.

The American Lawyer, December, pp. 545–549.

The Next Constitutional Convention of the United States. Hon. Walter Clark. It may sound somewhat strange to hear the Constitutional Convention of 1787 called "reactionary," yet Judge Clark is probably justified in so calling it in contra-distinction to that which put forth the Declaration of Independence. In that convention were met men of Hamilton's type, distrustful of their fellow men—perhaps naturally so, under the circumstances—, and desirous of an hereditary executive. Yet men of Hamilton's type were not prevalent or even predominant in that convention, and readers of the debates would be hard to convince that they were wholly opposed to democracy. It is true that some of the wishes of the greater men were disregarded; the instrument had to be formed on the level of the majority, naturally a much lower plane. Men like James Wilson felt keenly that the election of senators through the intervention of the state legislatures or any other medium was a fault so grave that they only consented to accept it because to refuse was to fail of any constitution at all. But in spite of these things they had been immensely successful in keeping faith with the people. Had their interpretation of the instrument they had helped to form been accepted the omission of a Bill of Rights, which Judge Clark thinks so undemocratic, the omission would not have needed to be made good. It is true, as Judge Clark

says, that the Federal Constitution was adopted 119 years ago and is entirely unchanged. It is also true that every state has revised its constitution since that time. But what state at this day has a constitution superior to that of the United States? It is true that the governing power is not exercised by the people. It is not so true that it is not, as yet, in the hands of the people. At present the people believe that the majority governs through the medium of the dominate political party; its legislatures and its Congress, with its president. Once thoroughly convince the greater portion of the people that this is not the case, and it will be very quickly shown wherein the power does reside. Judge Clark's apparent preference for the English form of government as placing the power in the elected representatives of the people, as shown in the House of Commons is somewhat contradicted by recent history; the House of Lords defies the House of Commons and the greatest majority in its history and forbids all legislation inimical to its interests. In England as in this country the "vested interests" control legislation.

We are told that "the election of senators should be given to the people." Many of the framers of the constitution were convinced that this should be the case. But who is to give the power to elect them to the people, if that power has already passed out of their hands? Not the people of that class who already hold the power, if Judge Clark is right, for they would be last to dispossess themselves of any power they now hold.

Judge Clark desires the election of senators by direct vote of the people, a new apportionment for senators, a change in the method of electing the president, and a change in the presidential term. He denies the power of the Supreme Court to declare statutes unconstitutional, and does not believe that the constitutional members intended it to have that power, although such men as Madison and Wilson favored it.

Judge Clark is inspired by a deep feeling of devotion to the constitution and the rights of the people under it, and his arguments for the reforms in which he believes are clear and earnest.

CONTRACTS.

The Doctrine of Boston Ice Company v. *Potter.*• George P. Costigan, Jr. Since the decision of this case in 1877 it has become well known in both court and class room. Mr. Costigan has taken it up "to examine a dictum of the court which has been taken to mean that since the defendant was dissatisfied with the manner of the supply of ice by the plaintiff under the former arrangement, he might have refused to deal with the plaintiff as assignee of the Citizen's Ice Company's contract, if he had been notified in time of the assignment." The assignability of the contract is then considered. Under the present law of Massachusetts it appears that as the "assignee of a non-negotiable legal chose in action," the plaintiff could recover. The validity of the assignment is first considered, The conclusion is that the Boston Ice Company was "entitled to all the rights of assignee of the contract of the defendant of the Citizen's Ice Company." The second question is "Was the Boston Ice Company entitled to recover on quasi-contract principles? The plaintiff could not recover, in Massachusetts, if it was in the wrong because of the concealment practised. "But" asks Mr. Costigan, "Even in Massachusetts, are there not relative degrees of badness?" He thinks the Boston Ice Company "only mildly bad or generally praiseworthy," and a recovery under

similar circumstances has been allowed in other jurisdictions. It is another doctrine of the Massachusetts courts that one may evade quasi-contractual liability in some instances by constantly denying any liability. In the case under consideration the defendant never had a chance to protest against liability to the plaintiff, but this fact is immaterial in Massachusetts, if only the plaintiff was not officious in acting." So it all comes back to the assignment, because, if the plaintiff had legal rights as assignee, he was not only not officious but the defendant owed him the kind of legal duty which . . . . could be the basis of a quasi-contractual obligation against a defendant." In concluding Mr. Costigan says:—

"The upshot of our whole discussion may be stated in two propositions:

1. If the Court's notion that the express contract was not assignable could by any possibility be correct, the decision in Boston Ice Company v. Potter would be erroneous because the plaintiff, reasonably believing itself entitled to act as assignee, was not an officious intermeddler, and, having no remedy on the express contract, was entitled to recover in quasi-contract.

2. If, however, the court was wrong in thinking the contract not assignable to plaintiff, and that it *was* wrong we have already seen, the decision in the Boston Ice Company case was perfectly sound because the plaintiff, having already an adequate remedy on the express contract in its assignor's name, had no excuse for asking that a quasi-contractual obligation be imposed upon the defendant.

"It is submitted that in Boston Ice Company v. Potter the contract was assignable to plaintiff; that it actually was assigned to plaintiff; that plaintiff had an adequate remedy on the express contract in its assignor's name; that the plaintiff's remedy on the express contract precluded any quasi-contractual obligation; and that because at that time in Massachusetts the assignee of a contract could not sue in his own name on the express contract the case was rightly decided."

Columbia Law Review. January, pp. 32–49.

JUDICIAL DECISION.

Evolution of the Law by Judicial Decision. Robert G. Street. The article opens with some very striking extracts from Maine, Amos, Cicero, and a judicial opinion by Judge Lowrie of this state. The extracts are intended to establish the proposition that public opinion is the source of all law, and to show that law is responsive to public opinion.

As an agency in the development of our system of law, the Civil and Roman law is recognized as most important and our debt to them is acknowledged. The existence of certain legal fictions "opposed to the intelligence and common sense of the age" is noted and also the unfortunate fact that many of these erroneous conceptions were propounded in Blackstone's Commentaries, and are perpetuated by lawyers from generation to generation. Some of these are, "The Common Law is the perfection of reason" (Coke, of course, but exploited by Blackstone) "the courts have nothing to do with considerations of public policy," "precedents must be followed unless fatally absurd or unjust." Mr. Street controverts all these opinions; he contends that the acceptance of all these and kindred maxims has tended to "retard the development of our own system of jurisprudence," and that "the elementary writers also, with rare exceptions, present the profession with mere digests of the decisions, conveniently classified and

arranged; and on questions where the courts have differed, generally content themselves with weighing authority by merely citing the number of cases on the respective sides of the question." He asks, Can the claim made that this adhesion to precedent makes for certainty in the law be substantiated? He answers this in the words of the report made to the American Bar Association in 1886, "It is chaos."

In the second instalment of his article Mr. Street presents his idea in an interesting and at the same time very valuable manner. He believes that the course of judicial decision, hampered by a too servile attendance on precedent, has not kept pace with our individual and civic progress. He demonstrates his theory by good reasoning, original thought and with literary ability. He again warns us against the "erroneous theories perpetrated by Blackstone," and in one phrase sums up his indictment against these worn out maxims of the law, "Ignorance and indolence delight in formula."

American Lawyer, November, pp. 490–494, *December, pp.* 554–560.

INTENT.

The Modern Conception of Animus. Brooke Adams. "Law is a resultant of social forces." This phrase taken from the article, shortly defines its general trend. A first perusal may incline one to the belief that there is in it much that is new and perhaps startling. A second examination may rather leave the impression that here we have, not so much new matter, or even a new point of view, as an original system of presentation of the subject matter. It is contended that Mr. Justice Holmes' theory that "The law has nothing to do with the actual state of the parties minds. . . . It must go by externals and judge parties by their conduct" while in one sense a truism, is, taken in its popular signification "open to criticism." That in fact the law is always primarily engaged with the state of the parties minds, and only secondarily with acts which are but the effects of volition; and therefore no more than evidence of the mind's action, which is the matter in issue. As "it is the animus which controls human actions, and it is therefore animus which limits legal responsibility," proof of the animus is the thing which courts have attempted to control. Mr. Adams own theory is that this control has in all times been exercised by the classes most powerful in the community. In the days of the ecclesiastical power the church controlled the proof; sharing its power with the secular courts which were controlled by the military class; these being in time superceded by the landowners; they by the capitalists; and it seems to be implied, though not stated, that these latter are being superceded by a power not directly named, which has succeeded in securing legislation inimical to the capitalists, and which, by this theory must be now held to be succeeding to the dominant position, and to hold in its hands the power to adduce or suppress proof.

It is probable that this theory and the line of reasoning supporting it, so long as it is confined to the demonstration of the development of the law of treason, or even the criminal law, will meet with slight resistance in the mind of the average reader, but when the same reasoning is used in connection with the law of trespass, a recoil of many minds from the logic accepted in the former cases is easily conceivable. It is here that the theory first strikes at our modern law. It does this, however, in a manner that is both forcible and interesting, as well as able.

The Green Bag. January, pp. 12–23.

Restraint of Trade.

The Legal Aspect of Monopoly. Herbert Pope. "Monopoly viewed as size sufficient to give control of the market in a particular trade or industry may be accomplished in more than one way." Mr. Pope says this, and then goes on to ask, "Does the law object to size, control of the market, in itself, or only of a particular method of accomplishing size, or is size not taken into account at all?"

The invalidity of certain contracts between competitors, because in restraint of trade, are first considered, then contracts of sale between competitors, and contracts for the purpose of controlling and regulating the conduct of their competing interests. The examination is thorough, and Mr. Pope reaches the conclusion, that :—

"Some monopolies must be tolerated unless all roads leading to monopoly are closed. If that cannot be done without interfering with the ordinary methods of competition, then the only course left is not to prohibit altogether size which gives control of the market, but to restrict the uses which may be made of size and limit the competitive power of size to perpetuate itself regardless of the interests of the general public. The success of a competitor, where competition is still active, is the gain of the purchasing or consuming public. But success which is so secure that the public may be disregarded must be controlled. The competitive system is maintained, not merely for the benefit of the successful competitor, but to serve the welfare of the whole community. The public is interested, not in the success of any one competitor, but in the continuous and effective operation of free competition, active and potential. When such restraining influences are no longer effective, so that the interests of the successful competitor and those of the public no longer correspond, the public interests must be protected in some other way. It may then become necessary by means of legislation to control the power and regulate the conduct of all large corporations, no matter what their past history."

Harvard Law Review, January, pp. 167-191.